1908. In that year a new Limitation Act was passed and Article 60 was amended to read as follows:—

> "For money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker so payable."

The addition of the words underlined of course disposed of the difficulty which had arisen from the conflicting decisions to which I have referred, and made it quite clear that transactions of a customer with a banker in India fall under Article 60 and not under Article 59. But it seems to me that this amendment must be regarded as indicating that the Legislature agreed that the decisions of the Calcutta and Madras Courts had correctly interpreted the Legislature's intention in introducing Article 60 into the Act of 1877. In other words, the 1908 amendment was inserted to remove doubts which had arisen from the conflicting decisions given by the Courts of Bombay and of Allahabad and to make it quite clear that the intention of the Legislature in 1877 was that transactions between banker and customer should be governed by Article 60 (vide *Rustomji* on Limitation, 4th edition, page 414).

The Legislature of this Colony has not thought it necessary to follow the example of India and amend our Article 42 by inserting the words added there in 1908 to the corresponding Article, but possibly that is because there have been no conflicting local decisions on the point. Our Articles 41 and 42 therefore still correspond to the Indian Articles 59 and 60 as they stood prior to 1908.

In all these circumstances I am of opinion that the Article which governs the present case is Article 42 and that Article 41 is excluded by the more specific provision. The Plaintiff's claim is therefore not barred by limitation.

I do not think that any difficulty arises from the use of the word "deposited" in Article 42. It has been held in *Motigavri* v. *Naranji Dwarkadas*, (A.I.R. 1927, Bombay 362) that the word "deposit" in the corresponding Indian Article 60 covers all payments of the customer's moneys made to the banker which make up the credit balance in favour of a customer in the banker's hands. I think it is correct to say that money placed in the custody of a banker in circumstances such as in the present case is "deposited" within the meaning of the Article in question, and that the use of the expression "deposit" does not necessarily imply the existence of any sort of fiduciary relationship.

On the view I take of the law and on the facts as I have found them the Plaintiff is entitled to judgment for the amount claimed with costs.

Judgment accordingly.

Solicitors for the Plaintiff—*Drew & Napier.*

Solicitors for the Defendant—*Chan & Eber.*

[ORIGINAL CIVIL JURISDICTION]

WHITLEY, J.

July 18, 1934.

CHEAH EWE CHONG & Anor.....Plaintiffs.

v.

CHEAH KEE EE & 15 Ors.....Defendants.

[PENANG SUIT No. 280 of 1933]

Charities — Practice — Position of Attorney General in suit for removal of trustees on ground of maladministration—Ordinance No. 22 (Crown Suits), S. 59.

A suit concerning the administration of charities in the Colony in which the commission of various breaches of trusts is alleged against the trustees of the Estate should be commenced in the name of the Attorney General as plaintiff.

Yeo Him & Ors. v. *Yeo Cheng Kang & Ors.*, 4 Ky. 500 considered.

The true effect of section 59, Ordinance No. 22 (Crown Suits) is that in suits regarding charities and public interests the practice and the position of the Attorney General shall be substantially the same as in England and that where he would be plaintiff in England he should be plaintiff in this Colony and where he would be a defendant in England he should be a defendant in this Colony.

Chua Sin Ghee v. *Chua Tian Choon*, (1933) S.S.L.R. 559; 2 Mal. L.J. 259 considered and distinguished.

Where the proceedings are defective by reason of the non-joinder of the Attorney General as plaintiff, the defect may by amendment of the Writ of Summons and Statement of Claim be cured and the action proceed with the leave of the Attorney General.

Trial of an action heard before Whitley, J. on the 13th July, 1934.

This is an action brought by the members of the *Seh Cheah Kongsi* (*Cheah* tribal society) against the trustees of the *Kongsi*. The Attorney General was added as one of the defendants under S. 59 of Ordinance No. 22 (Crown Suits). The plaintiffs claimed execution of the trusts of the *Kongsi*, removal of the trustees, accounts and other reliefs. The Statement of Claim alleged, *inter alia*, various breaches of trusts committed by the trustees. At the trial Counsel for defendants 1—15 inclusive took the preliminary objection that the action was wrongly instituted by the plaintiffs who had no *locus standi* as it concerned a public charity and contended that the Attorney General alone was entitled to sue.

Conaghan (*Hume* with him) for Plaintiffs.

Hogan (*De Buriatte* with him) for Defendants 1—15.

W. C. Taylor, Deputy Public Prosecutor, for the Attorney General of the Straits Settlements.

Cur. Ad. Vult.

WHITLEY, J.—I have had an opportunity of considering the preliminary objection taken by Mr. Hogan and, in view of the conclusion to which I have come, I directed the Registrar to notify Counsel that no witnesses need attend to-day.

The point taken was that as the subject matter of this action is the administration of a public charity the Attorney-General alone can sue. The case of *Yeo Him & Ors.* v. *Yeoh Cheng Kang & Ors.*, 4 Kyshe 500 is direct authority on this point. That case was similar to the present one in that it concerned the administration of a "Seh" or tribal *kongsi* and that there were allegations of breach of trust and a prayer for the removal of trustees. It was held by the Court of Appeal that the "Seh" or tribal *kongsis* in these Settlemnts are public charities and that the Attorney-General is the only person who can sue in any suit relating to them and that the objection that the Attorney-General ought to be and is not such a party is fatal, although the suit may have proceeded through various stages and even to final judgment and appeal. Such an objection cannot be waived by the parties to the suit.

It is sought to distinguish that case on the ground that the Attorney-General was not made a party at all whereas in the present case he is a defendant and some support is to be found for that distinction in the judgment of Sproule. Acting Chief Justice, in the Singapore case of *Chua Sin Ghee* v. *Chua Tian Choon*,* (1933) S.S.L.R. at page 565, where he held that the Penang case (*Yeo Him & Ors.* v. *Yeo Cheng Kang & Ors.* to which I have just referred) was not concerned with any question whether the Attorney-General should be plaintiff rather than defendant but only with the fact that he was not a party at all, and should have been following upon the finding that the trust was a public charity. The learned acting Chief Justice then held that so far as the necessary presence of the Attorney-General was concerned it was sufficient that he was a defendant.

Mr. Hume informed me that in another unreported case Cobbett, J. had held similarly, but I was given no details as to that case. It would appear from the report of the Singapore case that there was no argument as to the reasons which have led the Legislature and the Courts in England to require and hold that in such cases the Attorney-General is the only proper person to sue.

That being the state of the authorities in this Colony is there anything in the present case or in our local law which can entitle me to disregard the very clear ruling of the Court of Appeal? Section 59 of Ordinance No. 22 (Crown Suits) provides as follows:—

> 59. All suits and proceedings in the Court relating to charities or otherwise in which the Crown is interested, or in which the interests of the public are affected, or in which if brought in England the Attorney-General of England would be, or would be made, a necessary party as plaintiff or defendant, whether by himself or by relation of parties, shall be brought and had in the name of the Attorney-General of the Colony as plaintiff or defendant; and he shall have and exercise therein the same rights, duties, and powers as the Attorney-General of England would have and exercise in England in similar cases so far as the circumstances of the Colony and the constitution of its Government and Courts admit.

It was argued that the effect of this Section is to make it immaterial whether the Attorney-General is plaintiff or defendant so long as he is a party, but I do not think that the Section goes so far as that. It does not purport to create a new practice; it merely provides that in suits regarding charities and public interests the practice and the position of the Attorney-General shall be substantially the same as in England and that where he would be a plaintiff in England he should be plaintiff here and where he would be a defendant in England he should be a defendant here.

It is, I think, clear on reference to the authorities that in England in a case such as the present in which breaches of trust are alleged against trustees the proceedings would be by an action in the nature of an information. The proper and formal shape of a suit for determining the mode in which the funds of a charity should be administered was by the information of the Attorney-General. *Per* Wigram, V. C., *Governors of Christ's Hospital* v. *the Attorney-General*, (1846) 5 Hare 257. The Attorney General appeared before the Court not as an ordinary plaintiff endeavouring to obtain redress for a private wrong but rather as one officer of the Crown informing the Judge, another officer of the Crown, of some neglect on the defendant's part in the performance of a public duty and demanding a remedy. Under the present practice the title 'information' is not used and an action would be commenced by writ of summons but the action would still be brought by the Attorney-General at the instance of relators, and his consent and authority would be required throughout the proceeding though he does not always act personally.

* 2 Mal.L.J. 259.

An alternative method in England would be under Romilly's Act on petition, but under this Act also

> "the petition must be submitted to and be allowed by the Attorney-General and such allowance be certified by him before any such petition shall be presented."
>
> (52 Geo. 3 c. 101 section 2).

It is important to note that under either method no proceedings could be instituted without the approval in one form or another of the Attorney-General, and the reasons for insisting upon this safeguard in such cases are clearly set out by Eldon, L.C., in two of his judgments.

In the case of the *Attorney-General* v. *Green*, 1 Jacob & Walker 303, he observes:—

> "It is the duty of the Court to take care that as little expense as possible should be incurred by the charity estate.
>
> I apprehend the Legislature was very careful when it passed that Act (Romilly's) seeing that some abuses might arise from the proceeding by petition to provide that no one should proceed in that way without the approbation of the Attorney General or the Solicitor-General. Here it was presented without that sanction.....It is clear that the order on the petition must be considered as a nullity."

In *ex parte Skinner, In re Lawford Charity*, 2 Merivale 453, he says:—

> "The intention of the legislature in framing the Act, was to guard charitable trusts from abuse, and, for that purpose, to prevent such proceedings from being instituted as are too frequently instituted for no other reason than because it is known that the costs will be payable out of the charity funds. It was with this view that the legislature provided for the signature of the Attorney-General, or, in case of there being no Attorney, of the Solicitor-General; and I desire to have it understood, that no petition under the Act ought to receive that signature, except upon the same deliberation that it would be thought fit to afford to the case if it were presented in the shape of an information."

This aspect of the law does not appear to have been put before the learned acting Chief Justice in the Singapore case and I feel doubtful whether if it had been put to him he would have come to the same conclusion, although questions of estoppel arose there which do not arise in the present case. I am strengthened in this view by the fact that in Suit No. 724 of 1930, which was an action similar to the present one brought against the trustees of the same *kongsi*, the same learned Judge on 13th April, 1931, made an order that the plaintiffs should substitute the Attorney-General as plaintiff within six weeks from that date, in default of which the whole proceedings should be set aside. Thereafter the Writ and Statement of Claim were amended and the title read—

> His Majesty's Attorney-General for the Straits Settlements on the relation of Cheah Ngoh Oh.....*Plaintiff*
>
> vs.
>
> Cheah Tek Thye & Ors.....*Defendants*

I accordingly consider myself bound by the ruling of the Court of Appeal and by the English cases. To allow this action to proceed further as at present constituted would be to run the risk of all proceedings being eventually set aside and the heavy costs of what must be a prolonged hearing would be thrown away. The distinction between having the Attorney-General as plaintiff or defendant is not merely a technical one. The whole point of requiring that he be plaintiff is that his prior sanction shall be obtained in some form or another. When he is merely a defendant his sanction is not required. In many cases where charities are concerned it is sufficient that he be a defendant, but not in a case such as this, when maladministration is alleged.

That being so, the question arises as to what is the best course to pursue having in mind always the best interests of the charity. As Eldon, L.C. pointed out in the case of *Attorney-General* v. *Green (supra)*, it is the duty of the Court to take care that as little expense as possible should be incurred by the charity estate, and the Court has in many instances relaxed in favour of charities the rigour of its rules of procedure.

Examples are given in *Tudor* on Charities, 5th edn., 351. An action may by amendment of the writ and statement of claim be turned into an information and action, the necessary sanction of the Attorney-General being obtained. *Caldwell* v *Pagham Harbour Reclamation Company*, (1876) 2 Ch. D. 221.

This case was followed by Wood, J., in the Penang case of *Hajee Abdullah* v. *Khoo Tean Tek*, 1 Kyshe 500, where the plaintiffs having obtained leave to use the name of the Attorney-General moved *ex parte* for an order to amend the pleadings by inserting the name of the Attorney-General as plaintiff and adapting the pleadings to the new state of facts. The amendment was allowed on payment of the costs occasioned thereby. Two alternatives thus appear to be open to me. I should not in any case dismiss the suit as that might hereafter raise a question of *res judicata*. I can either set aside

all proceedings or make an order similar to that made in Suit No. 724 of 1930, already referred to, giving the plaintiffs the opportunity of obtaining the leave of the Attorney-General. The latter course would seem to me the better in the interests of all parties as it will save the expense of instituting proceedings anew, and I make an order accordingly that the plaintiffs do within six weeks substitute the Attorney-General as plaintiff, in default thereof all proceedings to be set aside with costs to be taxed and paid by the plaintiffs to the defendants. Costs of and incidental to the amendment to be the defendants in any event. All other questions of costs reserved.

Order accordingly.

Solicitors for the Plaintiffs—
Adams & Allan.

Solicitors for the Defendants 1—15—
Hogan & Ivens.

[APPELLATE CIVIL JURISDICTION]

FISHER, J., EBDEN & SPROULE, JJ.

August 7, 1912.

V. V. R. SOMASUNDARAM CHITTY
v.
A. R. P. AROONASALAM CHITTY

[SINGAPORE CIVIL APPEAL No. 3 of 1912]

Practice—Mortgage Debt, Action for—Mortgagee in possession—Special Indorsement on Writ—Summary Judgment—Civil Procedure Code 1907, S. 208.

Per C. A. (Fisher and Sproule JJ. Ebden J. diss: reversing Hyndman-Jones, C.J.):—

Unconditional leave to defend an action should be given to a Mortgagor where the Mortgagee having been in possession is seeking to recover the balance of his mortgage money, without an account thereof having been taken by the Court; and such account is claimed.

Appeal from the order of Hyndman-Jones, C.J. at Chambers, affirming the order of the Registrar giving leave to the Plaintiff to sign summary judgment unless the sum of $5,000 were paid into Court by the Defendant.

The material facts of the case are stated in the judgment of Sproule, J.

Koek (Sr.) (*Parsons* with him) for the Defendant.

A. K. a B. Terrell for the Plaintiff.

The matter was argued on the 1st and 2nd July, 1912, when the Court of Appeal (Fisher, Ebden and Sproule, JJ.) reserved judgment, which was delivered on the 7th August, 1912.

Cur. Ad. Vult.

FISHER, J.—In this case I have somewhat regretfully come to the conclusion that the appeal must succeed for I find it impossible to hold that there is not a plausible dispute as to what the plaintiff is entitled to recover, or that there is not a triable issue to go before the Court, or that it would be possible to say, without going into the merits, that it is impossible that there should be a defence.

The cases cited seem to leave no doubt that for the purposes of Order XIV it is not permissible to go into the merits, except possibly as far as in certain cases to enable the Court to say positively that no defence is possible and also to make it clear that if there is a triable issue and a plausible dispute, and no impossibility of a defence the defendant is entitled to unconditional leave to defend. The regret I feel arises from the impression I cannot but gather from the learned Chief Justice's words that the proposed defence and counterclaim savoured of unsubstantiality and lack of ground, and that he therefore did not think it right to interfere with the Registrar's discretion in putting defendant on conditions. I think, however, that in the cases, that is not enough, and defendant must have leave to defend unconditionally.

The Appeal therefore succeeds, and the order will be that defendant should have unconditional leave to defend, and his costs of the appeal and of the hearing below.

EBDEN, J.—I differ from what I understand to be the view of the rest of the Court in that I do not think that the Judgment under Appeal should be disturbed. Counsel for Appellant who has put his case before us very clearly has pointed out, that the principle on which the Court acts, is that where Defendant can shew by affidavit that there is a *bona fide* triable issue he should be allowed to defend that issue unconditionally and that when once a reasonable ground of defence is shewn there is no power to go into the merits in considering leave to defend. Also that leave should be given when there is reasonable ground for enquiry on an account in order to ascertain the amount recoverable. But the defendant's affidavits must condescend upon particulars which must be sufficient to show a *bona fide* defence.

The Defendant in his affidavit complained the Plaintiff had rendered him no accounts of rents and income of the property from 5.1.10 onward. But Plaintiff went into possession only in April, 1911, the property having been till then in the hands of Messrs. Powell & Co. the receivers appointed by the Court. If Defendant had anything to say about the accounts up to that date he should have called on the Receivers to vouch. When Plaintiff went into possession he continued the services of Messrs. Powell & Co. as his agents to receive the rents and profits so that the accounts were kept by the same hand throughout on 25.11.11 Plaintiff filed two sets of accounts one for the period of the Receivership for which he was not answerable and one for the seven months, April to October, 1911, inclusive the period during which he had been in possession.